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Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860082-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

GAIL C. VAN TASSELL, and
AFTON VAN TASSELL,

Plaintiffs/Respondents)

v.

ELWOOD C. SHAFFER,

Defendant/Appellant.)

Case No. 20334

860082-CA

BRIEF OF PLAINTIFFS/RESPONDENTS

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County
Honorable Leonard H. Russon, Presiding

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FILED

OCT 22 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

GAIL C. VAN TASSELL, and)	
AFTON VAN TASSELL,)	
)	
Plaintiffs/Respondents)	
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v.)	
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IN THE SUPREME COURT OF THE STATE OF UTAH

GAIL C. VAN TASSELL, and)	
AFTON VAN TASSELL,)	
)	
Plaintiffs/Respondents))	Case No. 20334
v.)	
)	
ELWOOD C. SHAFFER,)	
)	
Defendant/Appellant.)	

BRIEF OF PLAINTIFFS/RESPONDENTS

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether §78-12-35, Utah Code Annotated, 1953, as amended, provides for the tolling of a statute of limitations for every absence of defendant from the State of Utah regardless of the availability of alternative methods of service under Rule 4(e)(1), Utah Rules of Civil Procedure.

2. Whether the trial court correctly applied §68-3-7, Utah Code Annotated, 1953, as amended, in deciding that the first day of absence would be excluded and the last day of absence would be included.

STATEMENT OF FACTS

On or about November 19, 1973, the Fourth Judicial District Court in and for Summit County, State of Utah, in the matter of Kamas State Bank v. Gail C. Van Tassell, Charles O. Shaffer and Elwood C. Shaffer, entered a judgment for the

plaintiff and against the defendants in the amount of \$33,162.12.
(R.104)

On December 3, 1973, said court, in the same civil action, entered judgment as follows:

"WHEREFORE, by virtue of the law and by the reason of the premises aforesaid, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Gail C. Van Tassell have and recover from Elwood C. Shaffer a judgment for any and all sums paid by Gail C. Van Tassell to the plaintiff, Kamas State Bank, on the deficiency judgment of \$33,162.12 entered herein by Kamas State Bank, together with interest at the rate of 8% per annum for any and all payments made on the judgment until reimbursed by Elwood C. Shaffer.

2. That Gail C. Van Tassell have and recover from the defendant, Elwood C. Shaffer, a judgment in the sum of \$17,889.00, together with interest at the rate of 8% per annum from the date hereof until paid, together with Van Tassell's costs and disbursements in this action amounting to the sum of \$105.00." (R.104)

Thereafter, on February 1, 1974, the Kamas State Bank duly executed an assignment of judgment to Afton Van Tassell, wife of Gail C. Van Tassell, on the judgment entered on November 19, 1973. (R.105)

This action was commenced on February 5, 1982, for the renewal of the two judgments entered in November and December, 1973.(R.105)

The trial court in the instant matter, applying §68-3-7, Utah Code Annotated, 1953, as amended, that the defendant, Elwood C. Shaffer, was absent from, and outside the

boundaries of the State of Utah for a period of 96 days. (R.106, 107)

Plaintiffs filed a motion for summary judgment (R.25-26) which was heard before the Honorable Judith Billings on May 26, 1983. Judge Billings ruled that all times when the defendant was out of the State of Utah, after entry of 1973 judgments, tolled the statute of limitation and was not a part of the period of time provided for before the commencement of an action upon said judgments. (R.90-91 & 99)

The trial court further ruled that the day on which defendant left the State of Utah would not be included in the time of his absence and that the day on which he returned would be included. (R.106-107)

After a trial on the merits, the court found that defendant was absent from the State of Utah for a total of 96 days which was sufficient time to toll the statute of limitations and made plaintiffs' filing timely. (R.107)

The court further found that the amount due and owing on the judgment assigned to Afton Van Tassell is \$61,681.44 and, the amount due and owing on the judgment of December 3, 1973, to Gail C. Van Tassell is \$33,273.54, together with court costs in that action of \$105.00. (R.107-110)

SUMMARY OF ARGUMENT

Absence from the State of Utah within the meaning of §78-12-35, Utah Code Annotated, 1953, as amended, means the physical absence of the defendant from the state. The Utah Supreme Court has long subscribed to the general rule that despite the availability of alternative methods of service, the statute of limitations is tolled by defendant's absence from this state. The Utah Supreme Court has steadfastly subscribed to this rule irrespective of the fact that during defendant's absence from the state of Utah, an action could have been commenced by serving his wife at the family residence. Defendant, in the present case, was absent from this state for a period of 96 days. Therefore, the trial court properly held that for said 96 days the statute of limitations was tolled, and that plaintiffs filed this action timely.

The trial court properly applied §68-3-7, Utah Code Annotated, 1953, as amended. According to that section, the first day of defendant's absence from this state was excluded and the last day of defendant's absence was included. The trial courts findings regarding defendant's absence from this state were supported by substantial evidence, and therefore, must not be disturbed on this appeal.

ARGUMENT

POINT I

DEFENDANT'S ABSENCE FROM THE STATE TOLLED THE
STATUTE OF LIMITATIONS AND, THEREFORE, PLAINTIFFS'
ACTION AGAINST DEFENDANT WAS TIMELY FILED.

Utah Code Annotated, §78-12-35, 1953, as amended,
provides as follows:

"If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

This court was first called upon in the case of Lawson v. Tripp, 34 Utah 28, 95 P. 520 (1908), to apply a former Utah statute, §2888, which was identical to the current statute. In the Lawson case, which involved a breach of contract, this court stated as follows:

"While a general rule is that statutes of limitation generally are to be liberally construed, it is also a well-recognized doctrine that, when such statutes contain provisions excepting certain persons or classes from the operation of the statutes, those exceptions are to be strictly construed. And courts will not by construction extend the exception so as to include persons not expressly mentioned therein." Id. at 522.

In the case of Keith O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954, (Utah 1917), this court again held that defendant's absence from the state of Utah tolls the statute of limitations. The Supreme Court affirmed the trial court,

notwithstanding the fact that defendant's family continued to live in this state. The court stated:

" . . . It is, however, conceded that the defendant's family, consisting of his wife and minor children, continued to live in this state during all of the time that the defendant was out of the state and absent therefrom. It is contended that under our statute (Comp. Laws 1907, §2948, Subd. 8) an action could have been commenced against the defendant at any time by serving process on defendant's wife at the family residence or place of abode. The question, what effect shall be given to the provisions of section 2888, supra, is therefore squarely presented.

Defendant's counsel contends that the provisions of that section apply only to cases where neither the debtor nor his family have a place of abode or residence within the state so that process cannot be served, and that where, as in this case, process can be served at the place of abode of his family, and thus an action can be commenced at any time, the running of the statute is not arrested by reason of the defendant's absence from the state.

. . . The cases cited from Iowa, Nebraska, Connecticut, and California are all based on statutes which, in legal effect, are like our section 2888, supra, which we have quoted in full. Notwithstanding the language of those statutes, however, it was held in those cases that mere absence from the state in the case the debtor could be served with process within the state would not arrest the running of the statute of limitations. The cases cited from Massachusetts, Mississippi, New Hampshire and Vermont are, however, based upon statutes that are quite different from ours. In Massachusetts the statute is arrested only in case the debtor is 'absent from and resides out of the state.' . . . Under all of the foregoing statutes, therefore, nonresidence of as well as absence from the state is necessary to toll the running of the statute. . . . Upon the other hand there are a large number of cases emanating from states where a statute

like ours is in force in which it is held that the full time that the debtor is out of the state and absent therefrom must be excluded in computing the time, and that such is the case notwithstanding the fact that the debtor's family may have a residence or place of abode in the state, and that service of process could be made upon some member of the debtor's family at its residence or place of abode.

Our statute is an exact transcript from the California statute, and in the case of *Rogers v. Hatch*, (44 CAL. 280), the rule applicable to the facts in the case at bar is stated in the following words:

'If, when the cause of action here accrues, the person against whom the same exists resides in the state, and he afterwards departs from the state, his successive absences from the state must be aggregated together and deducted from the whole time which has elapsed since the cause of action accrued, and the balance is the time the statute of limitations has run.'

This general rule was affirmed by this court in Buell v. Duchesne Mercantile Co., 231 P. 123, (Utah 1924). In that case the defendant unsuccessfully argued that his absence from the state should not toll the statute of limitation because he in fact maintained "a residence in the state, with persons residing there upon whom service of process might be made, prevented the tolling of the statute. That particular question has been determined by this court adversely to the contention of appellant." Keith O'Brien Co., supra; Buell, supra.

In a later case, Gass v. Hunting, 561 P.2d 1071 (Utah 1977), the general rule was affirmed. The Utah Supreme Court in that case clearly and distinctly stated the rule as follows:

"The statute and case quoted above seemed clear. A suit on a judgment may be commenced during the eight-year period following the entry thereof, and the debtor's absence from state tolls the eight-year period."

Applying the reasoning behind the above-cited cases to the facts of the present case, it is evident that the trial court's ruling must be affirmed. The Utah State Legislature has expressed the will of the people by enacting §78-12-35. In accordance therewith, the Supreme Court has held that "an absence from the state tolls the eight-year period". Gass, supra, at 1072.

It is undisputed that the defendant "absented himself from the state of Utah" for a period of 96 days. (R.106-107) Since such time is not part of the time limited for the commencement of the instant action, which was filed on February 5, 1982, (R.105) it is well within the limits provided for in said section.

Despite the clear and unambiguous language of §78-12-35 and the decisions of this court, defendant, in his brief, at pages 6 through 10, boldly seeks to overrule the cases cited herein and change the rule to which this court has subscribed since 1908. Specifically, the defendant is urging this court to

amend §78-12-35 by inserting an exception into that section which the state legislature has declined to insert. To support his argument, defendant is relying upon Snyder v. Clune, 15 Utah 2d, 254, at 390 P.2d 915 (Utah 1964).

In Snyder, this court found that the non-resident motorist was not absent from the state, so as to toll the statute of limitations, because he had an agent authorized by law to receive service of process. The Snyder case, unlike the present case, involved the applicability of a special statute, §41-12-8, Utah Code Annotated, 1953, as amended.

The court, however, in that case was primarily concerned with preserving "the policy of law of allowing a reasonable time for the bringing of an action, but of providing a definite limitation of time in which it must be brought or the matter put at rest." Id. at 916. The court further expressed a concern that to accept plaintiff's argument with respect to the interpretation and application of §78-12-35 would permit the commencement of an action "10, 20 or any number of years" after the accrual of the cause of action. Id.

It is hereby submitted that these concerns do not exist in the instant case. Arguably, had the Utah Supreme Court ruled that the statute of limitations is tolled while a non-resident motorist is absent from the state, an action involving such motorist could be suspended indefinitely. Assuming, for the sake

of argument, that plaintiffs in this case had waited 96 more days before filing this action, and that defendant was within the state during such time; then plaintiffs' action would have been barred by §78-12-22.

In other words, this action is governed by a definite limitation of time in which it must be filed or it will be put to rest. It is that "definite limitation" which concerned the court in the Snyder case.

Defendant's argument that plaintiffs should have availed themselves of the alternative method of service of process pursuant to Rule 4(e)(1), Utah Rules of Civil Procedure, must be rejected. The election of which method of service to utilize must be made by the plaintiffs. It is not within the province of defendant, nor the court, to dictate which method of service of process plaintiffs should elect. It is further submitted that accepting defendant's argument would inject a sour note into, and would not harmonize with, the policy of law of allowing a reasonable but definite limitation of time in which to file an action. Snyder, supra, at 916.

Section 78-12-35, Utah Code Annotated, 1953, as amended, was transcribed verbatim from the California Code of Civil Procedure, §351. Therefore, decisions by the California Supreme Court regarding these issues must be afforded significant consideration by this court in resolving this matter.

In Dew v. Appleberry, 591 P.2d 509, (Cal. 1979), a tort action, the California Supreme Court held as follows:

"We find no irreconcilable conflict between §351 and the statutes governing substitute service. The Legislature may have justifiably concluded that defendant's physical absence impedes his availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of this state in order effectively to commence an action within the limitations. At the same time, by providing alternative forms of service, the Legislature simply encourages a plaintiff to adjudicate his claim expeditiously if possible; by using substitute service, a plaintiff may now obtain a binding judgment even in the defendant's absence. While the alternate service provision may lessen the need for §351, we do not believe that a repealed §351 pro tanto." Id. at 513.

Other jurisdictions have also concluded that a statute of limitations is subject to tolling statutes during the time defendant was absent from the particular jurisdiction. See Wetzel v. Weyant, 323 N.E. 2d 711, (Ohio 1975), Dicker v. Brinkley, 555 S.W. 495 (Tex. 1977); Loomis v. Skillerns-Loomis Plaza, Inc. 593 S.W. 2d 409 (Tex. 1980); Travis v. McGlaughlin, 224 S.E. 2d 243 (M.C. 1976); and 55 A.L.R. 3d 1158, §4 (a).

Though defendant did not abscond from the state of Utah to avoid service of process, he was, however, absent from the state for 96 days. (R.106-107). In calculating the time within which plaintiffs had to commence this action, credit must be given for said 96 days. And, that is exactly what the trial court did. Affording defendant the relief he prays for upon this

appeal is contrary to the general rule to which this court has long subscribed.

Defendant's only concrete support for his position is the Snyder case. However, the cursory comparison of that case with the instant matter reveals one obvious difference, i.e., the special non-resident statute. That statute has no application to the instant case. Furthermore, a more thorough reading of Snyder, supra, reveals that, in that case, the Utah Supreme Court was concerned about the possibility that a purported claim may be preserved indefinitely after its origin; which "would not comport with neither reason nor justice". Snyder, supra, at 916. The threat of the everlasting claim, strikes discord into the general policy of law to have all claims brought within reasonable but definite time. That is why the Snyder decision was proper under the given circumstances. However, the circumstances surrounding the present are distinctly different; and, therefore, the reasoning of Snyder must be limited to the facts of that case, must not be extended to all civil matters.

Defendant laments about the plaintiffs' formal discovery to ascertain, among other things, information regarding defendant's absence from the State of Utah. (Defendant's brief, page 10.) The sum and substance of this charge is that the statute of limitations should be judicially amended to protect

defendant from having to comply with the formal demands for discovery in accordance with the general rules of discovery.

If a party to an action abuses the discovery process, then the courts can, and should, issue appropriate orders to redress the abused party. Rule 26(c), Utah Rules of Civil Procedure. Such orders cannot be so expansive as to amend a valid statute, such as §78-12-35, just to appease a party who is unhappy about having to comply with proper demands for discovery.

POINT II

THE UTAH CODE CONTAINS A PROVISION THAT THE TIME IN WHICH ANY ACT PROVIDED BY LAW IS TO BE DONE IS COMPUTED IN DAYS.

§68-3-7, Utah Code Annotated, 1953, as amended, provides as follows:

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last day, unless the last is a holiday and then it is also excluded."

The trial court, in computing the days on which defendant was outside of the state of Utah, excluded the first day and included the last day. (R.106) This computation led the trial court to conclude that from December 3, 1973, through December 3, 1982, defendant was outside of this state for a period of 96 days. (R.107)

In Gilroy v. Lowe, 626 P.2d 469 (1981), this court was asked to decide, among other things, whether an execution sale

took place within the prescribed time limitation. The court stated:

"The method of computing time periods relating to acts provided for by law is set out in . . . §68-3-7 . . . When the time period is measured in months or years from a certain date, the day from which the time is to run is excluded and the same calendar date of the final month or year is included." Id. at 471.

The language of §68-3-7 is clear and unambiguous, and has been literally applied by the Supreme Court. Regardless of how the time periods are measured, the first day is excluded and the last day is included. For example, if a defendant is out of the state for 30 days, the first day will not be included in computing the time such defendant is absent from the state. Whereas the last day will be included in such computation. In other words, such a defendant, for the purpose of tolling the statute of limitation, would have been outside the state for 29 days.

Based upon §68-3-7, Utah Code Annotated, 1953, as amended, and the Supreme Court's decision regarding the computation of time, it is submitted that the trial court's decision must be upheld, and the defendant's argument upon this appeal must be rejected.

It has long been recognized by this court that a trial court's findings and conclusions, if supported by substantial evidence, will not be disturbed upon appeal. Sine v. Salt Lake

Transportation Co., 106 Utah 289, 147 P.2d 875-879, (1944). In a more recent case, Sharpe v. American Medical Systems, Inc., 671 P.2d 185 (1983), this court stated the standard of review to be utilized on appeals is as follows:

"In reviewing the findings and judgments of a trial court, after the trial on the merits, this court must view the evidence in the light most favorable to the prevailing party, and judgment will be affirmed with the findings of fact are substantiated by the evidence." Id. at 187.

See also Sohm v. Winegar, 565 P.2d 1134 (1977), where this court viewed the findings and judgment in the light most favorable to the prevailing party; and, First Western Fidelity v. Gibbons & Reed Co., 27 Utah 2d, 1, 492 P.2d 132 (1971), where this court held that it must survey the evidence in the light most favorable to the trial court's findings.

Applying the usual standard for review to the instant case, it is hereby submitted that when surveying the trial court's findings, with respect to the number of days defendant was absent from the State of Utah, in the light most favorable to plaintiffs, it is clear that said findings and judgment were supported by substantial evidence and, therefore, must not be disturbed.

CONCLUSION

This court has long adhered to the general rule that the statute of limitations is tolled when the defendant is physically absent from the state of Utah. Defendant is now

urging this court to overrule decisions and cases upon which this court has stood since 1908.

The case upon which defendant is supporting his argument is Snyder v. Clune, supra, a case which is factually distinguishable from the instant case, and, more importantly, a case in which this court addressed concerns that are not a part of the instant case.

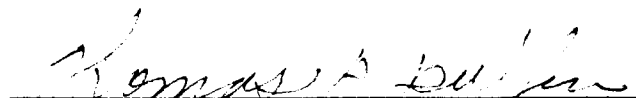
§78-12-35, Utah Code Annotated, 1953, as amended, is written in plain and unambiguous language and provides that "the time of (defendant's) absence (from the state) is not part of the time limited for the commencement of the action." The defendant is urging this court to act as a judicial legislature and amend said section. To amend a statute is a legislative power which is beyond the control of the judiciary. If the state legislature, when it enacted the sections in question, had desired to adopt the rule proposed by the defendant, then it could have done so; but it did not. Defendant should turn to the State Legislature, and not to this court, for the relief he seeks upon this appeal.

The defendant was not available for service of process for 96 days throughout the eight years following the entry of judgments for plaintiffs. Taking into account such absence, plaintiffs' instant action to reaffirm said judgments was timely filed, and was not barred by the statute of limitations. The judgment of the trial court must, therefore, be affirmed.

The trial court properly ruled to exclude the first and include the last day in computing the actual days defendant was physically absent from the state. This ruling is in accordance with the mandate of §68-3-6. Hence, the trial court's findings, based upon said ruling, must also be affirmed.

Dated this 22 day of October, 1985.

Respectfully submitted,



Thomas A Duffin
Attorney for Plaintiffs/Respondents

MAILING CERTIFICATE

I certify that I mailed four true and correct copies of the foregoing brief of respondent to the following parties by placing a true copy thereof in an envelope addressed to:

William F. Bannon
Attorney for Defendant/Appellant
600 Boston Building
Salt Lake City, Utah 84111

postage prepaid, this 22 day of October, 1985.

